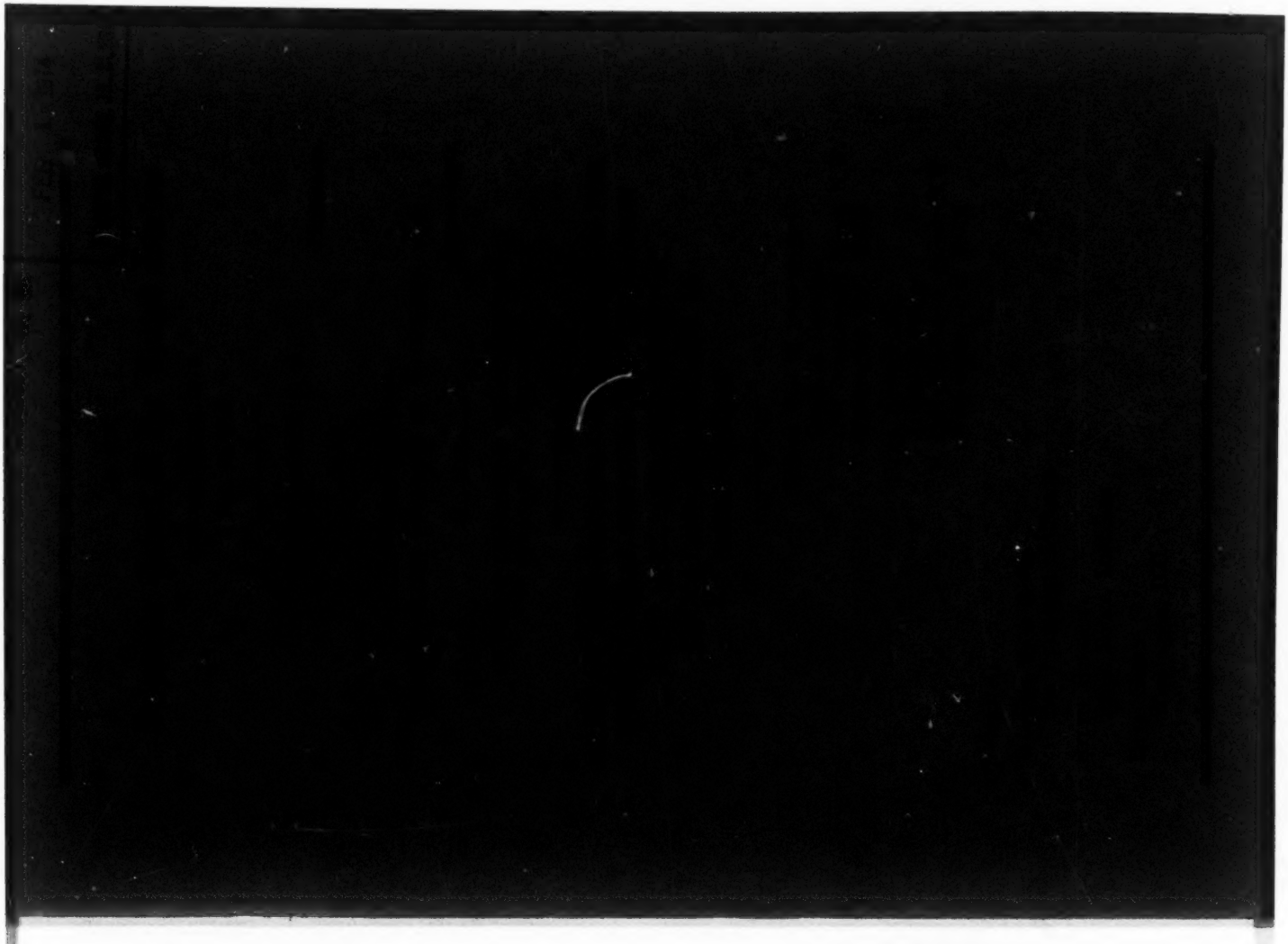

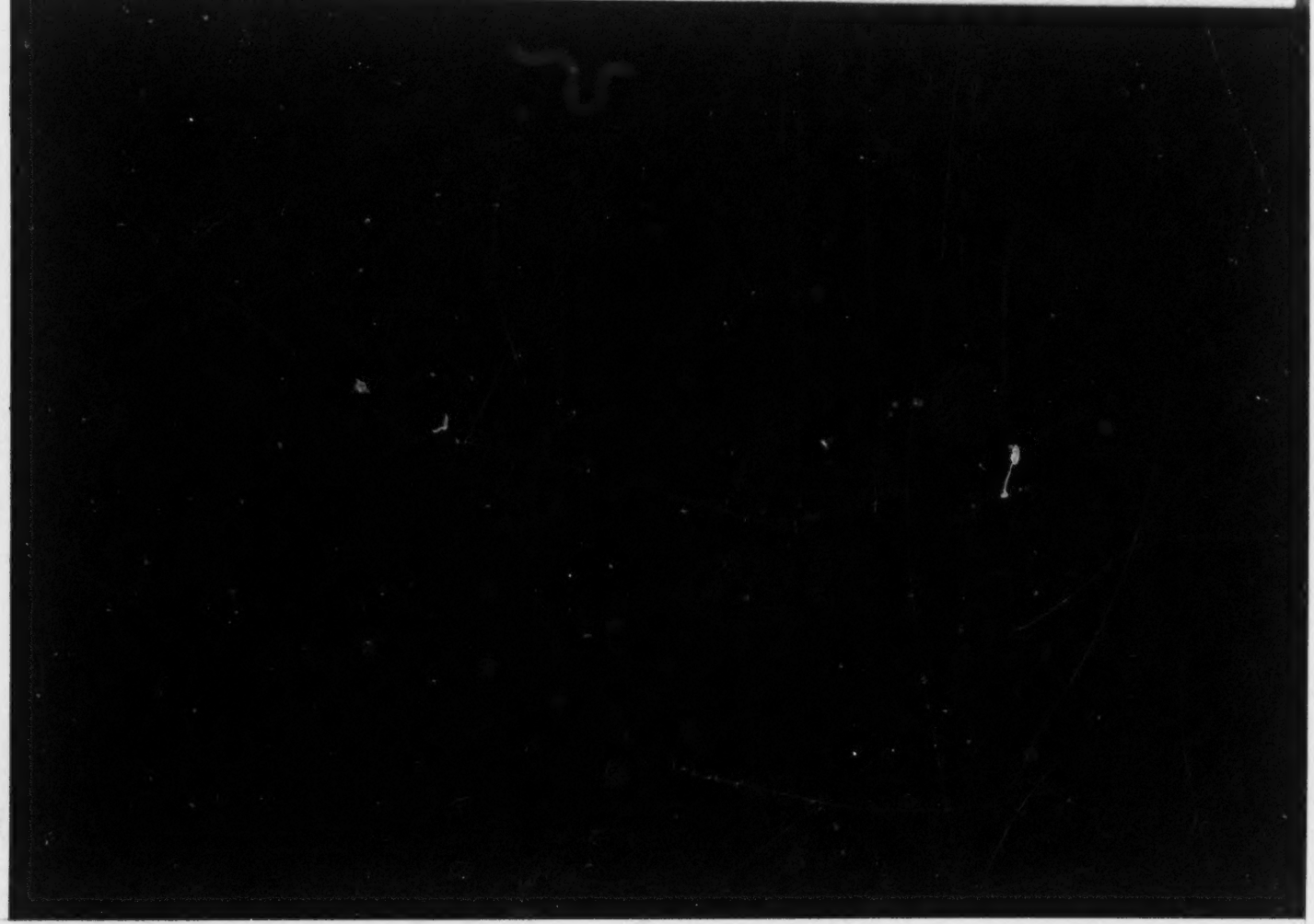

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In the

Supreme Court of the United States

October Term, 1973

No. 73-235

Marco DeFunis, *et al.*,

Petitioners,

—v.—

Charles Odegaard,
President of the University of Washington, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND, INC., AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE*

CONSENT TO FILING

This Amicus Brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

INTEREST OF AMICI

National Organization for Women Legal Defense and Education Fund, Inc. The NOW Legal Defense and Education Fund is the litigation and education affiliate of the National Organization for Women. NOW is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. The organization has a membership of approximately 30,000 with over five hundred chapters throughout the United States. Many of its members are university women, faculty and students.

NOW has taken an early and active stand to seek equal admissions opportunities for women by means of affirmative action programs and the establishment of goals and timetables. At its last National Conference a strong policy was adopted opposing the attacks on these programs for women and minorities. The decision of this Court will have overwhelming impact on the redress of effects of past discrimination on university campuses and implications for other affirmative action programs. NOW's efforts and members will be significantly affected by the results of this case.

National Education Association. The NEA is an independent, voluntary organization of educators, open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It is the largest professional organization in the nation, and has more than 1,300,000 members, including approximately 46,000 members employed in higher education.

NEA believes that our nation's educational institutions, at all levels, should reflect the diversity in our society, and that meaningful integration at higher levels of education

may require affirmative action programs in the admission of students to offset the effects of past discrimination. The decision of this Court will have a significant impact on the extent to which meaningful integration in the nation's institutions of higher education will be achieved in the years ahead.

QUESTION PRESENTED

Does the Fourteenth Amendment to the United States Constitution prohibit a State agency, the University of Washington Law School, from promoting meaningful integration of its student body and of the bar by allocating the limited number of spaces available in its first year class among the large number of qualified applicants in such a manner that members of certain minority groups which have historically been the victims of racial discrimination receive preferential consideration in the evaluation of their applications?[1]

[1] Petitioners have also presented to this Court a question under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). However, as Respondents have pointed out, this question was not raised in the trial court at all, was not passed upon by the Supreme Court of Washington, and is not properly before this Court. *Beck* v. *Washington*, 369 U.S. 541 (1962). Furthermore, the legislative history of the Civil Rights Act of 1964 is clear that the purpose of that Act was to protect minorities so that the statutory question is not different from that raised under the Fourteenth Amendment. See 2 U.S. Code Cong. & Admin. News 2355-409 (1964).

STATEMENT OF FACTS

The full factual background of the case and the opinions of the courts below are set out elsewhere. In brief, the facts are that Marco DeFunis, Jr., a white male, applied upon two successive occasions in 1970 and 1971 for admission as a first year law student at the University of Washington. The University of Washington Law School has a limited number of places and a large number of qualified applicants. Accordingly, the University places primary reliance upon a predicted first year average ("PFYA"), based upon junior and senior year college grades and scores upon the Law School Admissions Test ("LSAT"), in determining which of the qualified applicants shall be admitted and which shall not. The University admission standards have a certain amount of flexibility, but, in general, applicants with higher scores are preferred over those with lower ones.

In accordance with its efforts to increase the participation in the law school and bar of certain minorities which have historically been the victims of racial discrimination in this country (blacks, Chicanos, American Indians, and Filipino-Americans), the University gives a limited preference to qualified minority applicants. Thus, a number of such applicants are admitted with PFYA's lower than those which are required for nearly all "white" [2] applicants. DeFunis' application for admission was rejected upon both occasions because his PFYA was not high enough for admission on the scale applied to majority applicants, but a

[2] We use "white" here in view of the fact that Petitioners and their supporters have consistently used this term to refer to non-minority applicants, despite the fact that the minority group includes Chicanos and the non-minority group includes Chinese-Americans and Japanese-Americans.

number of minority applicants with lower PFYA's were admitted pursuant to the aforementioned affirmative action program. After his second rejection, DeFunis brought suit claiming that, since a number of minority applicants with lower PFYA's were admitted, his rejection was racially based and thus violative of the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The issue in this case is whether the Fourteenth Amendment, designed as a shield to protect minorities, can be used as a sword by the white majority to prevent limited preferential treatment for these minorities where a State reasonably determines that such treatment is necessary to promote meaningful integration and to assure that full equality of status is made available to minorities.

The first Mr. Justice Harlan, it is observed, stated that "Our Constitution is color-blind." *Plessy* v. *Ferguson,* 163 U.S. 537, 559 (1896) (dissenting opinion). However, Petitioners' attempt to utilize Justice Harlan's famous dissent to justify the result they seek in the present case ignores three centuries of American history critical to a proper analysis of the issue here.

The plain fact is that our Constitution has never been "color blind" in the sense used by Petitioners. It was not color blind upon its adoption in 1789 when it treated a black slave as three-fifths of a person and an untaxed Indian as no person at all. Art. I, § 2. It was not color blind in 1857 when Dred Scott was returned to slavery despite the Missouri Compromise. *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857). It was not color blind in 1896 when the Court upheld, over Justice Harlan's objec-

tion, State laws requiring segregation of the races. *Plessy* v. *Ferguson, supra.* It was not color blind in 1950 when blacks were sent to jail for picketing to obtain equal employment rights. *Hughes* v. *Superior Court,* 339 U.S. 460 (1950). As a result, it cannot be color blind now.

It is true that the nation has made remarkable progress in attempting to integrate minorities into the mainstream of American society in the twenty years since this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954). Furthermore, since *Brown* this Court has struck down a variety of sophisticated and not so sophisticated attempts to discriminate against blacks and other minorities, using broad language to the effect that racial classifications are constitutionally suspect. *E.g., Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964).

Nevertheless, no one could in good faith claim that that process is now completed, or that the effects of the discrimination allowed in this country for the 335 years preceding *Brown* have been eradicated. As a result, this Court has recognized that a neutral or color-blind policy—while of course desirable in the long run—is not neutral at all when established on a background of past discrimination. Rather, the impact of such a policy falls disproportionately on the minority groups which were the victims of past discrimination and fixes their members permanently in a subordinate status. *Lau* v. *Nichols,* 42 LW 4165 (decided January 21, 1974); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Hunter* v. *Erickson,* 393 U.S. 385 (1969).

The alternative, followed by the University of Washington here, is to provide through affirmative action the opportunity for the meaningful integration of minorities into all aspects of society. This may, indeed, mean preferences

for minority applicants in some areas. That is what the affirmative action programs adopted by the federal government in contracting under Executive Order 11246[3] and by various State agencies are all designed to accomplish. Despite their occasional protestations to the contrary, the position of Petitioners and their supporters would require this Court to strike down every governmental affirmative action program in the United States—because "affirmative action" means giving a preference to minorities.[4] That, in turn, will mean the end of meaningful governmental attempts to remedy the effects of past discrimination against racial minorities. No decision of this Court requires that result. On the contrary, virtually every court which has considered the matter has concluded that affirmative action of the sort at issue here is permissible, if not required. *Otero* v. *New York City Housing Authority,* 484 F.2d 1122 (2d Cir. 1973); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972); *Offermann* v. *Nitkowski,* 378

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[3] 30 Fed. Reg. 12319 (1965), as amended, 32 Fed. Reg. 14303 (1967), 34 Fed. Reg. 12985 (1969).

[4] Petitioners and most of the Amici supporting them insist that this case involves "quotas." Their insistence on the use of that term might be read to suggest that they are not attacking affirmative action programs. However, it is clear that the present case involves "affirmative action"—a preference—and not "quotas." There is not one shred of evidence in this record that the University of Washington Law School was attempting to reach any fixed percentage of minority enrollment. Indeed, so far as it appears from the record, the University was pursuing a generalized program of seeking to increase its minority enrollment without paying particular attention to numbers. The University of Washington Law School admissions policy is thus an example of an affirmative action program. Indeed, one of the Amici in support of Petitioners, the AFL-CIO, has argued this case in terms of affirmative action and has forthrightly stated its desire to overturn all affirmative action programs. Interestingly, twenty-five years ago in *Hughes* v. *Superior Court, supra,* the CIO filed an amicus brief urging the opposite result. 339 U.S. at 461.

F.2d 22 (2d Cir. 1967). See also *McDaniel* v. *Barresi*, 402 U.S. 39 (1971).

The University of Washington concluded, after a long period of consideration and based upon its experience in law school admissions, that the only practical way to obtain any rapid and substantial increase in minority enrollment in its law school was to adopt the affirmative action program here at issue. That conclusion was eminently reasonable and the resulting affirmative action program is therefore permissible under the Fourteenth Amendment.

ARGUMENT

The University of Washington's Affirmative Action Program for Minority Applicants Is Entirely Proper Under the Fourteenth Amendment.

A. *Racial Classifications Which Protect Minorities Are Not Suspect Under the Fourteenth Amendment.*

1. Under This Court's Equal Protection Analysis, Only Racial Classifications Which Disadvantage Minorities Are Suspect.

The present case is the first to be presented to this Court in which a member of the white majority has contended that favorable treatment afforded members of previously abused minority groups violates the Fourteenth Amendment. Indeed, this case is placed in the proper perspective if it is kept in mind that not only do whites constitute a substantial majority of the population of the United States as a whole and the State of Washington in particular, but, even after the racial preferences utilized here, approximately 90% of the students in the University of Washington's Law School student body were white.

The case put by the Petitioners and the Amici who support them is simple:

> (1) The Fourteenth Amendment makes racial classifications impermissible.
>
> (2) Giving a benefit to a member of a minority group on racial grounds, where the amount of such benefits available is limited, results in the denial of the benefit so awarded to any white not so treated.
>
> (3) The denial of such benefit to whites constitutes discrimination based on an impermissible racial classification and is therefore unconstitutional.

Petitioners' case is ultimately a matter of semantics: preferential treatment of minorities equals unconstitutionally discriminatory treatment of whites.[5] Such a formulation is simplistic and incorrect.

For example, the granting of scholarships by the University of Washington to poor students has not generally been considered to violate the Fourteenth Amendment. Yet it is clear that

> (1) Classifications based on wealth are constitutionally impermissible. *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

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[5] Petitioners and the Amici supporting them seek to magnify the purported injury in this case by asserting that this case involves a "deprivation" of independent rights. But under the decisions of this Court, Mr. DeFunis has no independent constitutional "right" to go to the University of Washington Law School, or, for that matter, to any other school:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 35 (1973).

(2) The University of Washington has a limited amount of scholarship funds available and affords preference to poorer students in awarding scholarships.

(3) A more well-to-do student is thereby denied a benefit—a scholarship—on grounds of wealth alone.

The point is that the extension of benefits to poor people without a corresponding distribution to the well-to-do is not discriminatory in the Constitutional sense* because giving scholarships to the poor merely secures for them benefits already available to the rich. On the other hand, it is evident that granting scholarships to the rich but not to the poor would be discriminatory, not to say irrational.

The foregoing analogy makes it clear that the fact that this Court has held on numerous occasions that classifications which discriminate against minorities on grounds of race are impermissible does not imply that favoring minorities is also impermissible. At the risk of appearing obvious, it must be emphasized that the Fourteenth Amendment was added to the Constitution to protect a powerless black minority against discriminatory treatment at the hands of

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* Some of the Amici supporting Petitioners suggest that preferences to "economically and culturally disadvantaged" students are not only allowable, but salutary, and that individual disadvantaged applicants (whether minority or white) may be given special treatment so long as race is not the basis for distinguishing among the persons so benefited. We would, of course, agree with the proposition that preferences could be given to the economically and culturally disadvantaged. And it is true that certain of the Respondents' witnesses attempted to justify the University's minority preferences on those grounds. But it does not follow, as Amici appear to assume, that such nonracial considerations are the only basis for constitutionally acceptable preferences. Of course, economic and cultural deprivation may well be one result of centuries of discriminatory treatment. But it is clear from the record that the purpose of the University of Washington's program was to overcome the effects of racial discrimination, not economic and cultural deprivation alone.

State governments and agencies controlled by the majority white population. Thus, this Court observed in *Buchanan* v. *Warley*, 245 U.S. 60 (1917):

> "It [the Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that, under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation . . . ." 245 U.S. at 77.

Similarly, in *Palmer* v. *Thompson*, 403 U.S. 217 (1971), the Court stated:

> "[T]he Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States." 403 U.S. at 220.

See also *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 420-44 (1968).

Indeed, for some years, this Court held that the Equal Protection Clause protected *only* blacks. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). While the scope of the Fourteenth Amendment has been expanded since those cases, there is no doubt that the Amendment's primary function is to protect minorities. As this Court has recently stated, the Fourteenth Amendment recognizes that, where inequality exists in American society, that inequality "falls on the minority. The majority needs no protection against [such] discrimination . . . ." *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969). Thus, in speaking of discrimination against Chicanos, this Court has noted that:

> "Throughout our history, differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954).

For that reason, classifications have been held suspect only where they operate to the disadvantage of "a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). See also *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973). For example, in rejecting a claim that classifications based upon school district wealth were suspect, this Court stated that such classifications

> "have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

Thus a racial classification which disadvantages minorities is suspect; one which favors them is not. As the court recognized in *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968):

> "[C]lassification by race . . . is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which, usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed." 395 F.2d 931-32.

The regrettable fact is that there are not always enough positions in law school, jobs, government funds, or other

governmentally distributed or allocated benefits to go around. And whenever such a limited benefit is given to one person, it is denied to another. It is the position of these Amici that State and federal government agencies are entitled to grant a reasonable preference in the allocation of limited resources on the basis of race where that preference helps the very minorities specially protected by the Fourteenth Amendment. The United States Constitution cannot be read to characterize such action as invidious racial discrimination.

2. The Courts Have Consistently Allowed Racial Classifications Which Benefit Minorities.

We are aware of no case decided since *Brown* v. *Board of Education, supra,* by this Court or by any court of appeals, which has ever held that a racial classification which protects minorities or which promotes integration is suspect.[1] In fact, a number of courts of appeals have consid-

[1] Certain of the Amici supporting Petitioners imply that such preferences do not really favor minorities because the effect of any preference or affirmative action program is to "stigmatize" minorities, branding them "inferior." There is nothing in their suggestions, not to mention the record, which supports such a conclusion.

First, the minority preference given in an affirmative action program is not designed to treat minorities as inferior, nor does it have that effect. Rather, the preference involved simply provides additional benefits for minorities which benefits might otherwise be denied as a result of longstanding racial discrimination. *See* R. O'Neil, Preferential Admissions: Equalizing Access to Legal Education, 1970 U. Tol. L. Rev. 281.

Second, there is little indication that minorities themselves feel that affirmative action programs, which are, after all, designed to help them overcome the effects of prior discrimination, stigmatize them. For instance, in the present case, a large number of the organizations which have been in the forefront of the fight to protect minorities from the effects of discrimination favor affirmative action programs and are filing briefs in this case in support of the University of Washington. On the other hand, no organization the membership of which consists largely of members of the purportedly stigmatized minority groups has filed a brief on behalf of Peti-

ered State action, similar to that involved here, according a preference to minorities in an attempt to achieve full integration; one court of appeals has even considered a program which, in limited circumstances, gave a preference to whites in order to insure integration. In every single one of these cases, a racial classification has been upheld where its purpose was not to disadvantage minorities, but to promote integration.

For example, in *Associated General Contractors* v. *Altshuler*, —— F.2d ——, 6 CCH EPD ¶ 8993 (1st Cir. 1973), the court considered Massachusetts' affirmative action program setting "goals" and granting preferences to minority workers. The court rejected the contractors' contention that racial classifications are per se unconstitutional:

> "It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment [of blacks and other minorities] is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." 6 CCH EPD at 6224.

Similarly, in *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973), the court held that pursuant to an act of Congress

> "Action must be taken [by state housing agencies] to fulfill, as much as possible, the goal of open, integrated

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tioners. These facts hardly suggest that such minority groups perceive the University's admissions program as stigmatizing. *See*, D. Bell, In Defense of Minority Admissions Programs: A Response to Professor Graglia, 119 U. Pa. L. Rev. 364 (1970).

> residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." 484 F.2d at 1134.

Thus, in *Otero* the court held that the New York City Housing Authority had an affirmative duty to promote integration in its housing projects, even though this meant assigning apartments on the basis of race and even though a preference had to be provided for white applicants in order to maintain the integrated nature of the project involved.

See also *TV-9, Inc.* v. *Federal Communications Commission*, —— F.2d ——, 28 P & F Radio Reg. 1115 (D.C. Cir. 1973) (FCC must treat minority ownership as a favorable factor in the awarding of broadcast licenses); *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972), and *Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (affirmative action plans giving preference to minorities in construction trades constitutional); *Shannon* v. *U. S. Dept. of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970) (HUD must take race into account to assure integrated housing); *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (school board revision of promotion list in order to aid minority applicants constitutional); *Offermann* v. *Nitkowski*, 378 F.2d 22 (2d Cir. 1967) (voluntary racial balance program to correct *de facto* school segregation may use racial classifications).

3. Voluntary Affirmative Action Programs Do Not Depend Upon a Finding of Specific Instances of Prior Discrimination.

Despite their arguments that racial classifications are per se invalid, Petitioners and their supporters are compelled to recognize that this Court has previously held that race *must* be taken into account in certain circumstances. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Green* v. *County School Board*, 391 U.S. 430 (1968). See also *United States* v. *Wood, Wire & Metal Lathers Int'l Union, Local No. 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Local 53, Int'l Ass'n of Heat & Frost Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969). Petitioners and their supporters, however, attempt to distinguish those cases on the ground that they involve the use of racial classifications as a remedy for specific instances of prior racial discrimination by the party being required to use a racial classification.[8] Indeed, Petitioners attempt to draw

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[8] Certain of the Amici contend that this Court's decisions have never sanctioned racial classifications or quotas which would operate to "disadvantage" any person. Thus, they claim that the school desegregation cases merely determine which children attend which school and do not result in the exclusion of any children from the school system. But they conveniently ignore the faculty aspects of the school desegregation cases. Thus, for example, in *United States* v. *Montgomery County Bd. of Educ.*, *supra*, this court required the hiring and assignment of teachers on a racial basis. Since the court order there required two black teachers for every twelve white teachers, it precluded the hiring of new white teachers in excess of that ratio. This, needless to say, imposed a "disadvantage" upon new aspiring white teachers not hired because of the requirement of the hiring of a certain number of black teachers. See also *Otero* v. *New York City Housing Authority*, *supra*; *Associated General Contractors* v. *Altshuler*, *supra*. In fact, any time a racial preference is imposed to assure that minorities are not victimized by past discrimination, there will be a "disadvantage" for those

from those cases the principle that race *cannot* be taken into account except in cases involving a prior court finding of State-imposed discrimination.

The basic flaw of Petitioners' analysis is that it fails to recognize the difference between what a State is *required* to do and what it is *permitted* to do. *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88 (1945). Compare *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (State not required to deny liquor license to private groups which discriminate against racial minorities), with *B. P. O. E. Lodge 2043* v. *Ingraham*, 297 A.2d 607 (Me. 1972), *appeal dismissed for want of substantial federal question*, 411 U.S. 924 (1973) (State may deny liquor license to private groups which discriminate against racial minorities). Even if *de facto* segregation and private discrimination, such as took place in the North, are not constitutionally prohibited, the Fourteenth Amendment clearly contemplates affirmative governmental efforts to eliminate such discrimination. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Compare *Keyes* v. *School District No. 1*, 413 U.S. 189, 217 (1973) (Mr. Justice Powell, concurring). Thus it simply does not follow that if the Fourteenth Amendment does not require a court to order the University of Washington to take race into account in its admissions policy, the Fourteenth Amendment therefore bars the University of Washington from doing so voluntarily.

As a matter of fact, no case in this Court, or in any court of appeals, has ever so held.[9] Indeed every appellate

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who will no longer have the benefit of discrimination against the disfavored group. But it has never been thought that discrimination must continue to exist for such a reason.

[9] *Hughes* v. *Superior Court*, *supra*, relied upon by Petitioners and a number of the Amici who support them is inapposite. In that case, the Court upheld the conviction for contempt of court of blacks who picketed to obtain hiring of black supermarket em-

court case which has considered the issue presently before the Court has concluded that a State may take race into account where it voluntarily chooses to adopt an affirmative action program designed to help minorities overcome the effects of societal discrimination, without regard to whether the State itself was the author of that discrimination. See, in addition to the cases cited at pages 14-15, *supra*, *Wanner* v. *County School Board*, 357 F.2d 452 (4th Cir. 1966); *Tometz* v. *Board of Education*, 39 Ill. 2d 593, 237 N.E.2d 498 (1968); *School Committee* v. *Board of Education*, 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968).

The contrary result urged on this Court by Petitioners is not only unsupported by authority but is illogical and would have pernicious results. If a State agency is not permitted to remedy the effects of racial discrimination through affirmative consideration of race unless it has itself been found guilty of *de jure* discrimination, it is then prohibited from attempting to provide a remedy for the effects of the general and widespread private discrimina-

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ployees in defiance of a State court injunction. In its opinion, the Court stated that there was a violation of the State's policy against all forms of discrimination in the attempt by the blacks to require a ghetto supermarket to hire a certain percentage of black employees and that the Due Process Clause of the Fourteenth Amendment did not bar California from enforcing that law. 339 U.S. at 462. Petitioners here rely upon *Hughes* for the proposition that the Equal Protection Clause of the Fourteenth Amendment bars the University of Washington from taking race into account in its admissions policy. However, *Hughes* was decided before *Brown* v. *Board of Education*, *supra*. Under the controlling decision then in effect, *Plessy* v. *Ferguson*, *supra*, the Equal Protection Clause allowed "separate but equal" and other such State action which this Court has long since held unconstitutional. Thus, the Court in *Hughes* did not even mention the Equal Protection Clause, let alone apply the sophisticated type of equal protection analysis the Court has developed more recently. Compare, *e.g.*, *Frontiero* v. *Richardson*, *supra*. Accordingly, it is submitted that *Hughes* furnishes no guidance on the equal protection issue raised by the present case.

tion which has pervaded American society for many years, for discrimination imposed by other States, or even for discrimination by other agencies of the same State. *But cf. Gaston County* v. *United States*, 395 U.S. 285 (1969).

Thus, for example, the University of Virginia would be permitted to grant a preference to minorities because it was at one time under legal compulsion to discriminate. It could then carry out a compensatory program to eliminate the disadvantages produced by its own past discrimination against minorities, as well as to eliminate the effects of past discrimination by others. The University of Washington, however, could not adopt such a program because there has been no finding by a court that it has been guilty of *de jure* discrimination.[10] Thus, it could not institute affirmative action programs to remedy the effects of the identical prior discriminatory treatment of minorities—because that discrimination was originally imposed by other States, such as Virginia, or by private parties, or by other agencies of the State of Washington. Such a result is illogical and unfairly penalizes minorities in States as to which there has been no finding of *de jure* discrimination.

Furthermore, under Petitioners' theory, all the cases upholding governmental attempts to remedy private discrimination in employment and housing by requiring racially based affirmative action programs would be reversed and governmental attempts to remedy such discrimination held unlawful. For example, since there has been no showing that every employer with a federal contract discrim-

[10] Of course, it may well be that the University of Washington's present admissions policy would be held unconstitutional in the absence of its affirmative action program because of its heavy reliance on the LSAT. Cf. *Griggs* v. *Duke Power Co., supra.* Furthermore, it may be that the State of Washington does have a history of racial discrimination, as the Opposition to the Petition for Certiorari in this case seems to indicate. Op., p. 18.

inates in employment, Executive Order 11246, which requires racially based affirmative action programs for Federal contractors,[11] would be unconstitutional. A similar fate would befall the 1968 Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, which requires the Secretary of Housing and Urban Development to consider race in order to promote integrated housing regardless of whether there has been a finding of prior discrimination. Every court which has been presented with such an argument has squarely rejected it. *E.g., Associated General Contractors* v. *Altshuler, supra; Southern Illinois Builders Ass'n* v. *Ogilvie, supra; Otero* v. *New York City Housing Authority, supra.* Cf. *Lau* v. *Nichols, supra.*

B. *The University of Washington's Affirmative Action Program for Minority Admissions Is Reasonable.*

In the preceding portions of this brief, Amici have demonstrated that (i) a classification based on race is neither per se unconstitutional nor suspect when it is utilized to benefit racial minorities previously victimized by discrimination and (ii) the utilization of race as a basis for remedial governmental action is not limited to cases involving court determinations of specific instances of prior

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[11] Ironically, it appears that the University of Washington, here under attack by Petitioners for its affirmative action program with respect to its student body, is being pressed by the federal government to establish an acceptable affirmative action program with respect to its employees:

> "The University of Washington faces the loss of millions of dollars of Federal funds unless it shows within 30 days that it has an acceptable program for employment of women and minorities. In a letter to Acting President Dr. Philip Cartwright, the U.S. Office for Civil Rights told the University that unless an acceptable affirmative action program is submitted by Jan. 11, the OCR 'will have no alternative but to conclude that the University is unable to comply with its obligations as a Federal contractor.'" Women Today, Vol. 3, No. 26, p. 5 (December 24, 1973).

invidious racial discrimination. Because the racial classifications under consideration here are not "suspect," the so-called "compelling state interest" standard of judicial review of State action challenged under the Equal Protection Clause is not applicable. Rather, the only remaining question is whether the action taken here by the University of Washington in according preferential treatment to minorities satisfies the general requirements of rationality or reasonableness laid down by the Fourteenth Amendment. *San Antonio Independent School District* v. *Rodriguez, supra; Jefferson* v. *Hackney,* 406 U.S. 535 (1972); *Dandridge* v. *Williams,* 397 U.S. 471 (1970).

To a great extent, both the validity of the University's goal and the rationality of the means used to achieve that goal have been demonstrated in the previous portions of this brief and need not be belabored here. In brief, the University's goal is to increase the integration of its law school and, thereby, ultimately to increase the participation of minority group members in the legal profession—as lawyers, judges, law teachers, etc.—both within and without the State of Washington. The validity of that goal is attested to by a long line of cases in this Court. *E.g., Brown* v. *Board of Education, supra; Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938).

The rationality of the means used by the University of Washington to achieve that goal is equally clear. As the record reveals, reliance by the University upon PFYA's in admitting applicants to its law school had previously resulted in only nominal attendance—one or two students per year—at the law school by members of the affected minority groups in prior years. It was thus evident that such reliance could not be continued if minority enrollment was to

be increased. At the same time, the University wished to continue to admit the best qualified applicants possible and regarded the PFYA as the best available means of measuring the relative qualifications of law school applicants. Accordingly, while no unqualified applicants were admitted, the University admitted some minority applicants with PFYA's lower than those of most whites.[12]

The University of Washington concluded, after a long period of consideration and based upon its experience in law school admissions, that the only practical way to obtain any rapid and substantial increase in minority enrollment in its law school was to adopt the affirmative action program here at issue.[13] The University was and is clearly entitled to decide, consistent with the spirit of the policies

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[12] As previously noted, the "whites" included Chinese-Americans and Japanese-Americans and the "minority" group included Chicanos. This fact further demonstrates the rationality of the University's policy, since it placed in the non-minority group those non-whites who had demonstrated an ability to obtain admission to the law school through the regular admissions process while placing some whites (Chicanos) in the minority category because the PFYA focus of the regular admissions process operated to deny them admission.

[13] It has been suggested by some Amici supporting Petitioners that a less onerous alternative would have been to continue to base admissions principally on PFYA's and to establish compensatory educational programs for minorities to enable them to increase their PFYA's and thereby obtain admission in the normal course. Other Amici contend, however, that such a program would suffer from the same constitutional infirmities as are alleged in the present preferential admissions policy. In any event, where—as here—the classification involved is not suspect, a State may adopt any rational or reasonable approach it prefers and need not choose the least restrictive alternative. See *San Antonio Independent School District* v. *Rodriguez, supra; Jefferson* v. *Hackney, supra.* And furthermore the fact remains that such a program would not have been a meaningful alternative because it would have taken far longer to result in any substantial increase of minority students.

established by this Court's decision in *Green* v. *County School Board, supra,* that what is required is meaningful integration now.

CONCLUSION

A color blind society in which race is given no consideration, in law or in practice, ought to be the goal of every American. But the plain fact is that neither our Constitution nor our society have been color blind to date, and long-standing pervasive racial discrimination has left its mark upon its victims. "Neutrality" in such circumstances is not neutral at all. Thus a preference which aids minorities—and there can be no doubt that the preference at issue here is just that—is perfectly consistent with the purpose of the Fourteenth Amendment. Petitioners and their supporters claim that preferences have "a history of subjugation" and that in some other case preferences may be used to discriminate against the minorities being benefited here. But the camel's nose in the tent argument by any other name is still the same. This Court, and other federal and State courts, are perfectly capable of distinguishing classifications which discriminate against minorities from those which aid them. The nation is committed to a policy of meaningful integration now, and it must remain so. Affirmative action programs such as that adopted by the University of Washington are one of the most effective,

and certainly an acceptable, means of making that policy work. The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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